IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-829

ANTHONY B. CATALDO,

Petitioner,

—against—

LESLIE J. BUGLASS, individually and as a member of Executive Committee of the Association of Average Adjusters of the United States, an unincorporated association, THOMAS LIVINGSTONE, individually and as Chairman of the said Association of Average Adjusters of the United States; CALEB DANA, individually and as Chairman of the Executive Committee of the Association of Average Adjusters of the United States; WILLIAM GREGG, ALLAN SCHUMACHER, CASPER H. HORSTING, and WILLIAM A. CARLSON; as members of the Executive Committee of the United States; and ALLAN SCHUMACHER, CASPER H. HORSTING and GARDNER A. NASON individually, and JOHNSON & HIGGINS, INC., and FRANK B. HALL & Co., INC.,

Respondents.

BRIEF OF RESPONDENT JOHNSON & HIGGINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Jurisdiction

This court is without jurisdiction to grant a writ of certiorari to review the order of the Appellate Division of the Supreme Court of the State of New York, Second Dept. (the highest state court in which a decision could be had,

rather than, as stated in the petition, the order of the New York Court of Appeals, which had declined review of the order of the Appellate Division) because the petition presents no federal question reviewable under 28 USC §1257 (3).

The sole question involved is the nonfederal ground of the exercise of discretion by state courts under states rules of procedure to dismiss for want of prosecution and to deny the petitioner's motion to amend his complaint as against all of the respondents, made in the fifth year after the commencement of the action and more than one year after the final appellate disposition of the petitioner's claims by the affirmances of summary judgments of dismissal as against all but the two respondents who, after such final disposition on appeal, sought and obtained the dismissal of the action as against them for want of prosecution.

Statement

The petitioner, an attorney at law, now appearing *pro se,* commenced his action in 1969, on an asserted state created nonfederal claim, in the Supreme Court of the State of New York, County of Queens, (the trial court in New York) seeking to reform an agreement made in 1953, (which provided, among other things, for the use of office space by petitioner in exchange for his services as an Association secretary and the annual payment of $240, and also seeking damages for its alleged breach and a tortious interference therewith (12a).

Issue was joined in 1969, by the service of the answers to the complaint, and thereafter separate motions were made by the respondents, with the exception of respondent Johnson & Higgins, Inc. (hereinafter "Johnson & Higgins", its correct name) and Frank B. Hall & Co., Inc. (herein-

after "Frank B. Hall"), for summary judgment dismissing the complaint, which were granted in 1970 (12a) and 1971 (23a), and the actions dismissed, and also severed, as to the then non-moving respondents, Johnson & Higgins and Frank B. Hall.

From 1970 to 1973, the petitioner's various motions for reargument, appeals to the Appellate Division of the Supreme Court, Second Department and motions for leave to appeal to the New York Court of Appeals to reverse the summary judgments of dismissal were rejected, so that on November 14, 1973 it was finally determined up to the Court of Appeals that there were no triable issues of fact as against the moving defendants and that the plaintiff's claim as so litigated had no merit. New York Civil Practice Law and Rules (hereinafter "CPLR") 3212.

In November 1974 and January 1975, five years after joinder of issue and one year after such final determination, Johnson & Higgins and Frank B. Hall each served a demand upon the plaintiff to serve and file a note of issue (a notice to place the case on trial calendar) in accordance with CPLR 3216, which the plaintiff totally ignored.

Accordingly, separate motions were thereafter made by Johnson & Higgins and Frank B. Hall in January and March 1975 to dismiss the action as against them for want of prosecution. Instead of responding to the motion in compliance with CPLR 3216 by showing a justifiable excuse for delay in prosecution and a meritorious claim, the petitioner, in the sixth year after his action had been commenced, cross-moved in February 1975 to serve an amended complaint against all the defendants in place of the claim that had been finally rejected by the Court of Appeals over one year before. This audaciously late maneuver was correctly denied by the Supreme Court, Queens County, at

Special Term Part I, in an opinion (9a) which granted the motions of Johnson & Higgins and Frank B. Hall to dismiss for want of prosecution and denied plaintiff's belated motion for leave to serve an amended complaint.

The decision at Special Term was affirmed by the Appellate Division of the Supreme Court, Queens County, on February 2, 1976 (51 AD 2nd 717) in an opinion which stated (7a):

> "Plaintiff did not show a justifiable excuse for the delay in prosecution and a good and meritorious cause of action, as required by CPLR 3216 (see *Brender* v. *Berman*, 37 A.D. 2d 835). Issue was joined in 1969; summary judgment was granted in favor of the defendant association and certain of the individual defendants in 1970 and 1971, respectively, and affirmed by this court in each instance (*Cataldo* v. *Buglass*, 36 A.D. 2d 720, mot. for lv. to app. den., 32 N.Y. 2d 518, *id.* 42 A.D. 2d 564, mot. for lv. to app. den., 33 N.Y. 2d 518). Plaintiff failed to resume prosecution and to file a note of issue within 45 days of service upon him of the separate demands therefor of the corporate defendants, made in 1974 and 1975. Rather, upon their motions to dismiss, plaintiff cross-moved to amend his complaint, alleging a new understanding of the parole evidence rule as set forth in a case decided in 1962. Such delay in seeking amendment precludes its being granted (see *DeFabio* v. *Nadler Rental Serv.*, 27 A.D. 2d 931)."

Leave to appeal or reargue was denied by the Appellate Division on March 4, 1976 (p. 11) and a motion for leave to appeal (as well as an appeal taken as of right) was dismissed by the Court of Appeals on May 4, 1976 for lack of appellate jurisdiction on the ground that "the order sought to be appealed from involves a question of discre-

tion of the type not reviewable by the Court of Appeals" *Cataldo* v. *Buglass, et al.*, 39 N.Y. 2d 807 (3a) and, a motion for reargument thereon was denied on September 21, 1976 (1a).

Reasons for Denying the Writ

1. On November 14, 1973 the merits of the claims of the petitioner had been finally rejected, severed and dismissed at the conclusion of all appeals in the courts of the State of New York on the motions for summary judgment made by all of the respondents except Johnson & Higgins and Frank B. Hall and, thus, the petitioner's claims for relief were "in final judicial repose" on that date as against all but those two defendants." See *Slater* v. *American Min. Spirits Co., et al.*, 33 N.Y. 2d 443, 447 (1974). In addition, the petitioner concedes (page 21 of his petition) that he "cannot complain that the original complaint for reformation [and damages] was dismissed."

Yet, when two remaining defendants, Johnson & Higgins and Frank B. Hall moved one year later to dismiss the complaint as against them for want of prosecution after the petitioner had failed to serve a note of issue, pursuant to the statutory demand therefor, he made no attempt to justify his failure to prosecute and posed no federal ground whatever in opposition to the motion. Indeed, in an affidavit, requesting reargument in the Appellate Division, he acknowledged that CPLR 3216 (authorizing dismissal upon the failure of a plaintiff to serve and file a note of issue, in accordance with such demand) is not unconstitutional, citing *Cohn* v. *Borchard Affiliations*, 25 N.Y. 2d 237 (1969), holding CPLR 3216 to be constitutional.

Clearly, the dismissal for want of prosecution amounted to no more than the exercise of discretion by the courts of

the State of New York to dismiss for want of prosecution, well within the power of all courts, both state and federal, to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962).

Indeed, in the analogous context of delayed discovery in the federal courts, this court noted that courts are authorized and required to exercise their discretionary power to impose sanctions for undue delay "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, —— U.S. ——, 96 S.Ct. 2778 at 2781 (June 30th 1976).

2. The petitioner did not (and could not) claim any constitutional federal right to belatedly serve an amended version of his nonfederal claims as against all of the defendants by a motion made more than one year after their final disposition as against all but two of the defendants, a denial held, on appeal, to be well within the bounds of the state court's judicial discretion.

Contrary to the tenor of petitioner's argument, the amendment procedure of a state court is not subject to the directives of the Federal Rules of Civil Procedure, but even those rules would not require the grant of leave to a plaintiff in 1975 to serve an amended complaint as a matter of right five years after the commencement of an action and more than one year after the plaintiff's original claims had been finally rejected on appeal, for the purpose of asserting a new theory as against all the defendants, on the basis of an alleged prior misconception of the law and a purported different understanding of the law allegedly set forth in a case decided years before, in 1962. Cf. *Troxel*

Manufacturing Co. v. *Schwinn Bicycle Co.*, 489 F.2d 968 (6 Cir., 1973).

3. Curiously, the petitioner appears to urge that the state court unconstitutionally deprived him of a jury trial of his nonfederal claim, even though the question of a trial by jury was never raised in the state court, since there were no triable issues of fact presented on the finally decided summary judgment motions and no note of issue was ever filed demanding a jury trial as required by the New York law which provides that a jury may only be demanded when a note of issue for trial is served and filed (CPLR 4102).

In any event, "a trial by jury is not constitutionally required" in a state court civil action of petitioner's nonfederal claims. *Alexander et al.* v. *Virginia*, 413 U.S. 836 (1972). Manifestly, the Fourteenth Amendment does not guarantee any particular form or method of state procedure in a civil action. As stated in *Olesen* v. *Trust Company of Chicago*, 245 F.2d 522, 524 (7 Cir., 1957):

> "It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts . . .
>
> A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214."

4. Apart from the absence of a federal question, the petition presents no question of importance that would

warrant the review by this court, of a discretionary determination by a state court of intermediate appellate jurisdiction of a type which even the highest court of that state declined to review, and which the state judicial system has assigned for determination by its trial and intermediate appellate courts. See 7 Weinstein-Korn-Miller ¶ 5501.22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 17, 1977.

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